APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

UNITED STATES GRAPHITE COMPANY,

v.

HARRIMAN, SECRETARY OF COMMERCE.

No. 36695

Filed June 17, 1947

Opinion

J. Marvin Haynes, of Washington, D. C., for plaintiff.

John F. Sonnett, Asst. Atty. Gen., and *Edward H. Hickey,* Sp. Asst. to Atty. Gen., for defendant.

PINE, *Justice:*

Plaintiff is a manufacturer of a graphite product known as "graphitar." It is used particularly in the manufacture of marine and aircraft engines. In 1943 the demand for graphitar began to exceed the capacity of plaintiff's plant. Accordingly, plans were made for a factory addition. and for the necessary machinery and equipment therein required. On June 27, 1943, plaintiff filed an application for a certificate of necessity under Section 124 of the Internal Revenue Code, in order that it might secure a deduction for amortization of the entire cost of the factory addition upon its Federal income and excess profit tax returns, and

on October 28, 1943, a necessity certificate was issued therefor.

On May 29, 1944, plaintiff filed an application for a necessity certificate covering facilities (machinery, etc.) for use in the factory, which had then been constructed. Thereafter plaintiff received a communication dated July 17, 1944, and entitled "letter of predetermination," stating that these facilities were eligible for tax amortization on a 35% basis, provided the date of acquisition was subsequent to the date of such letter. On July 27, 1944, plaintiff filed an affidavit showing that a portion of such facilities had been acquired prior to the date of the letter of predetermination and that the balance had been acquired thereafter; whereupon there was issued to the plaintiff a necessity certificate for that part of the facilities listed as being received after the date of the letter of predetermination, up to 35% of their cost. Thereafter plaintiff demanded the issuance of a certificate which would include the entire cost of all the facilities, irrespective of the date of acquisition. This being refused, plaintiff brought this action to compel its issuance.

Defendant first moved to dismiss the complaint, and subsequently moved for a summary judgment. The action is before me for decision on these motions.

The issuance of this certificate of necessity is authorized by Section 124 of the Internal Revenue Code, 26 U. S. C. 124. Designed to stimulate the investment of private capital in defense facilities, this statute authorized the amortization of their cost as a tax deduction over a period of five years or less.

Plaintiff contends that defendant's predecessor, the War Production Board,[1] had no legal right to issue a necessity certificate for only 35% of the cost of the facilities acquired after the date of the letter of predetermination, but, once having determined to issue a necessity certificate, was required to issue one for the entire cost of the facilities acquired, both before and after such date.

The applicable provisions of this statute are contained in Section 124(f) of the Internal Revenue Code, reading, so far as material, as follows:

> "(f) . . . In determining . . . the adjusted basis of an emergency facility—
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> "(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such . . . acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President.
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> . . . . . .
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> "(3) The certificate provided for in paragraph (1) shall have no effect unless an application therefor is filed before the expiration of six months after the

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[1] Defendant's immediate predecessor was the Temporary Controls Administrator, whose predecessors were, in the order named, Civilian Production Administrator and the War Production Board, the Chairman of which was vested with the functions of the Secretary of War and the Secretary of the Navy under Section 124 of the Internal Revenue Code.

Executive Order No. 9841, April 23, 1947.
Executive Order No. 9809, December 12, 1946.
Executive Order No. 9638, October 4, 1945.
Executive Order No. 9406, December 17, 1943.

beginning of such construction, reconstruction, erection, or installation, or the date of such acquisition . . ."

The applicable provisions of the Regulations[2] prescribed under the above-quoted statute are as follows:

"(3)(c)(vi) *Government and privately financed facilities.* Necessity Certificates will be issued only where it is to the advantage of the government that the facilities in question be privately financed.

"(4) *Application must be filed before construction is begun or date of acquisition.* The construction, reconstruction, erection, installation or acquisition of a facility will not be deemed necessary within the terms of these regulations unless a determination of necessity is made by the certifying authority prior to the beginning of the construction, reconstruction, erection, installation or date of acquisition."

It will be noted that Section 4 of the Regulations, above quoted, provides that the acquisition of a facility will not be deemed necessary unless a determination of necessity is made prior to the date of acquisition. Defendant's action in limiting the certificate of necessity to the facilities acquired after the letter of predetermination appears to be authorized by this regulation, and plaintiff does not contend to the contrary. Instead, it places its reliance upon the claim that the regulation contravenes the statute. The question, therefore, is whether the six-month period may be shortened by regulation, the effect of which was to apply a brake on over-expansion of plant facilities, by requiring their necessity to be determined prior to

[2] Regulations governing the issuance of necessity certificates under Section 124(f) of the Internal Revenue Code prescribed by the Chairman of the War Production Board with the approval of the President, dated December 17, 1943. 8 F.R. 16964.

acquisition in order to be eligible for tax amortization. As above set forth, the statute provides that the necessity certificate shall have no effect unless application therefor is filed before the expiration of six months after date of acquisition. But the statute also contemplates its implementation by regulation, and expressly provides that certification of necessity shall be under regulations prescribed from time to time by the executive officials. Under defendant's interpretation, the statute permits these officials, in the exercise of discretion, to shorten, by regulation, the time for filing applications for necessity certificates, but places an outside limit of six months on their effectiveness, beyond which executive discretion ceases. This construction would seem to be warranted, in view of the clear purpose of Congress to provide flexibility in administration to meet changing conditions and circumstances in the prosecution of the defense program; but in any event, defendant's construction being reasonable, it cannot be set aside by the courts in this proceeding.[3]

In respect of the second contention of plaintiff, that the statute does not authorize defendant to limit the amortization deduction to 35% of the cost, it should

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[3] Adams v. Nagle, 303 U.S. 532, 542.
Wilbur v. United States ex rel Kadrie, 281 U.S. 206, 219.
Work v. United States ex rel Rives, 267 U.S. 175, 182, 183.
United States ex rel Riverside Oil Co. v. Hitchcock, 190 U.S. 316, 323.
Thomas v. Vinson, 80 U.S. App. D.C. 346, 349.
Red Canyon Sheep Co. v. Ickes, 69 App. D.C. 27, 41.
United States ex rel Corbin v. Doyle, 68 App. D.C. 100, 104.
United States ex rel White v. Coe, 68 App. D.C. 218, 220.
Ickes v. Pattison, 65 App. D.C. 116, 119.
Reichelderfer v. Johnson, 63 App. D.C. 334.
Stookey v. Wilbur, 61 App. D.C. 117, 118.

be pointed out that the statute requires that there shall be included ONLY SO MUCH of the amount as is properly attributable to acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy [later Chairman, War Production Board] has certified as necessary in the interest of national defense, which certification shall be under such regulations as may be prescribed from time to time by the executive officials with the approval of the President. Among the regulations prescribed is Section (3) (c) (vi), *supra,* which provides that necessity certificates will be issued only where it is to the advantage of the government that the facilities be privately financed. Certification under this statute, as implemented by this regulation, clearly involved an exercise of discretion, which will not be set aside unless unreasonable, arbitrary, or capricious.[4] Here the certification was made pursuant to an established policy of the War Production Board which, after December 17, 1943, was vested with the functions of the Secretary of War and the Secretary of the Navy (Executive Order 9406). This policy limited amortization to excess war cost (estimated at 35%) in the case of facilities having presumptive postwar utility, which was found by the Board to be true of the facilities here involved. This would appear to be in furtherance of the legislative purpose to encourage capital investment

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[4] Wilbur v. United States ex rel Kadrie, supra.
Work v. United States ex rel Rives, supra.
United States ex rel Riverside Oil Co. v. Hitchcock, supra.
Calf Leather Tanners Assn. v. Morgenthau, 65 App. D.C. 93, 98, 99.
United States ex rel Bowling v. Hines, 60 App. D.C. 180, 181.
McCarl v. Rogers, 60 App. D.C. 111.
McCarl v. Walters, 59 App. D.C. 237, 238.

in the defense effort which would not be available because of fear that such investment would have no post-war value, and at the same time maintain the amortization benefits under such control that they would not unduly injure the revenue. Thus there is no showing that the exercise of this discretion comes within the exception permitting courts to intervene. So far as its exercise involves interpretation of the statute in question, the statement made in the preceding paragraph is equally applicable to the point here under discussion.

Accordingly the motion for summary judgment will be granted. Counsel will present, on notice, judgment carrying this opinion into effect.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9680

THE UNITED STATES GRAPHITE COMPANY, APPELLANT

v.

CHARLES SAWYER, SECRETARY OF COMMERCE, APPELLEE

Appeal from the District Court of the United States for the District of Columbia (now United States District Court for the District of Columbia)

Argued October 7, 1948 Decided February 28, 1949

Mr. J. Marvin Haynes, with whom *Messrs. W. C. Magathan* and *F. Eberhart Haynes* were on the brief, for appellant.

Mr. Edward H. Hickey, Special Assistant to the Attorney General, with whom *Messrs. George Morris Fay*, United States Attorney and *Richard E. Guggenheim*, Attorney, Department of Justice, were on the brief, for appellee. *Mr. Herbert A. Bergson*, Acting Assistant Attorney General, also entered an appearance for appellee.

Before EDGERTON, CLARK, and WILBUR K. MILLER, JJ.

PER CURIAM: The judgment is affirmed on the opinion of Judge Pine in the District Court. *United States Graphite Co.* v. *Harriman*, 71 Fed. Supp. 944.

WILBUR K. MILLER, J., dissenting: As my brethren have approved and adopted the District

Court's opinion without reproducing it, I shall restate the case before giving the reasons for my dissent.

In an effort to induce private enterprise to use its own funds in expanding manufacturing facilities to meet the requirements of national defense, the Congress enacted in 1940 § 124 of the Internal Revenue Code. Subsection (a) thereof is in part as follows:

> "Every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis (for determining gain) of any emergency facility (as defined in subsection (e)), based on a period of sixty months. . . ."

This is unequivocal and imperative language and is a grant of a right to the deduction described. If a later provision of § 124 is to be held to have modified a taxpayer's absolute right to the five-year amortization described in subsection (a) by giving to an administrative agency authority to restrict the amortization to something less than the entire cost, I take it that the intention of Congress to do so should be expressed in clear and unmistakable terms.

An emergency facility was defined by subsection (e) as one (a) which had been constructed or acquired after December 31, 1939, and (b) which had been certified by the proper authority as necessary in the interest of national defense.[1]

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[1] The pertinent portion of subsection (e) is as follows:

> "(1) *Emergency facility.* As used in this section, the term 'emergency facility' means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made. For

The appellant is a manufacturer of a graphite product known as "graphitar." In 1943 when the government required for war purposes greater quantities of graphitar than appellant could produce, the War Department insisted that it double its capacity by erecting a new building and installing therein the necessary machinery and equipment.

Relying—naively, as it turned out—on the provisions of § 124 of the Internal Revenue Code, the appellant erected the building and began the acquisition of machinery and equipment. With respect to the building, the appellant applied on June 27, 1943, for a necessity certificate under subsection (f)(1) of § 124, and received it from the Secretary of War on October 28, 1943. The entire cost of the building could therefore be amortized for tax purposes in the statutory five-year period. But with the acquisition of machinery, the appellant's troubles began. On May 29, 1944, and within six months after the installation of certain

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the purposes of this section, the part of any facility which was constructed, reconstructed, erected, or installed by any person after December 31, 1939, and not earlier than six months prior to the filing of an application for a certificate under subsection (f), and with respect to which part a certificate under subsection (f) has been made, shall be deemed to be an emergency facility, notwithstanding that the other part of such facility was constructed, reconstructed, erected, or installed earlier than six months prior to the filing of such application. For the purposes of this section, the part of any facility which was constructed, reconstructed, erected, or installed by a corporation after December 31, 1939, and before June 11, 1940, and with respect to which part a certificate under subsection (f) has been made, shall be deemed to be an emergency facility and to have been completed on June 10, 1940, notwithstanding that the entire facility was not completed until after June 10, 1940."

machinery and equipment, appellant applied for a covering necessity certificate to the War Production Board, which by Executive Order had succeeded the Secretaries of War and the Navy as the certifying agency. Although both building and machinery were essential to the increased production which the War Department wanted, the War Production Board refused to certify the full cost of the machinery. The Board issued to appellant on July 17, 1944, what it called a "letter of predetermination", stating the machinery and equipment would be eligible for amortization, but attaching two conditions which the appellant asserts were unauthorized.

Those conditions were: (1) that the machinery and equipment acquired by the appellant prior to July 17, 1944, the date of "predetermination", could not be amortized, and (2) that only 35 per cent of the cost of machinery and equipment acquired after that date could be amortized.

The first condition was imposed by the Board pursuant to its own regulation that a necessity certificate would not be issued unless application therefor had been made before the construction or acquisition of the facility.

The second condition was imposed by the Board because it had concluded that only 35 per cent of the cost of appellant's machinery installed after the date of "predetermination" could be certified as necessary to national defense, its idea being that "the facilities sought to be certified were of such a nature as to be presumably useful in post-war operations." Apparently the Board's theory was that 35 per cent of the cost of the machinery represented war-caused excess over the pre-war cost.

With respect to the first condition imposed by the Board pursuant to its regulation that application for certification must be made before the facility had been constructed or acquired,[2] the question is as to the validity of the regulation. To be sure, the Board had express authority under subsection (f)(1) to prescribe regulations governing certification. But a regulation may not conflict with the statute under which it is promulgated.

This regulation is in direct conflict with subsection (f)(3) of the statute, the pertinent portion of which follows:

> "(3) The certificate provided for in paragraph (1) shall have no effect unless an application therefor is filed before the expiration of six months after the beginning of such construction, reconstruction, erection, or installation or the date of such acquisition, or before December 1, 1941, whichever is later, ..."

Because of the conflict with the statute, the regulation was invalid and did not confer upon the War Production Board power to exclude from the necessity certificate all the cost of the machinery and equipment which the appellant acquired prior to July 17, 1944. Application for certification of that cost was season-

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[2] The regulation, dated December 17, 1943, 8 Fed. Reg. 16964, was approved by the President and the pertinent portion is as follows:

> "(4) *Application must be filed before construction is begun or date of acquisition.* The construction, reconstruction, erection, installation or acqisition of a facility will not be deemed necessary within the terms of these regulations unless a determination of necessity is made by the certifying authority prior to the beginning of the construction, reconstruction, erection, installation or date of acquisition."

ably made under the terms of the statute and could not be refused on the ground that the application had not been made before acquisition as required by the invalid regulation.

The second condition imposed by the Board in its "letter of predetermination" which restricted the taxpayer to a deduction with respect to the amortization of only 35 per cent of the cost of its machinery and equipment acquired after July 17, 1944, was authorized, the appellee contends, by § 124 (f)(1), which is as follows:

> "... In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—
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> "(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President."

In order to reach the extraordinary conclusion that subsection (f) (1) authorizes the certification as necessary to national defense of less than 100 per cent of the cost of a facility otherwise "emergency" in character, the appellee is forced to read subsection (f)(1) as though it provided:

> There shall be included in amortizable cost only so much of the cost of the facility as ... the Secretary ... has certified as necessary in the interest of national defense ....

Such reading omits important words in the subsection. It overlooks completely the fact that its language includes the following:

> "... as is properly attributable to such construction ... after December 31, 1939, as ... the Secretary ... has certified as necessary in the interest of national defense. ..."

The appellee's construction of subsection (f)(1) as meaning "only so much of the cost as has been certified as necessary in the interest of national defense" does plain violence to the grammatical structure of the statutory sentence, for, as has been said, it leaves out important words. Careful reading of the poorly worded subsection reveals its meaning as

> There shall be included as amortizable cost only so much of the cost of the facility as is properly attributable to the part of it which was constructed after December 31, 1939, and which has been certified as necessary in the interest of national defense.

We have seen that subsection (e), in defining the term "emergency facility", expressly excluded anything constructed or acquired before December 31, 1939. That critical date of subsection (e) was carried on into subsection (f)(1), which undertook to govern a situation involving a facility, a part of which was constructed before December 31, 1939, and so could not be amortized, and the other part of which was constructed after that date and so could be certified for amortization. I admit the Congress did a poor job of statute writing in framing subsection (f)(1); but when all the subsections are read together the meaning can be spelled out. The mere fact that subsection (f)(1) is so written does not justify a construction of it which eliminates important words and thereby dis-

torts it. I think subsection (f)(1) clearly means there can be amortized only the "adjusted basis" (which in this case means cost) of that physical portion of a facility which is "emergency" in character in that (a) it had been constructed after December 31, 1939, and (b) it had been properly certified as necessary in the interest of national defense.

The District Court's opinion, which has been adopted by my brethren as the opinion of this court, includes the following:

> "In respect of the second contention of plaintiff, that the statute does not authorize defendant to limit the amortization deduction to 35% of the cost, it should be pointed out that the statute requires that there shall be included ONLY SO MUCH of the amount as is properly attributable to acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy [later Chairman, War Production Board] has certified as necessary in the interest of national defense, which certification shall be under such regulations as may be prescribed from time to time by the executive officials with the approval of the President."

I suggest, with deference, that the foregoing is a distortion of the grammatical construction of the statutory sentence. It leaves out significant words in the statute, as I have pointed out heretofore. For the statute says "only so much of the amount . . . as is properly attributable to such construction . . . as . . . the Secretary . . . has certified as necessary in the interest of national defense." Obviously the meaning is "such construction as the Secretary has certified as necessary"; therefore, that there shall be included only so much of the cost as is properly attributable to such construction, after the critical date, as has been certified as necessary. If that were not true, the word

"such" before the word "construction" would be without significance.

The opinion of the District Court continues thus:

> "... Here the certification was made pursuant to an established policy of the War Production Board which, after December 17, 1943, was vested with the functions of the Secretary of War and the Secretary of the Navy (Executive Order 9406). This policy limited amortization to excess war cost [estimated at 35%] in the case of facilities having presumptive postwar utility, which was found by the Board to be true of the facilities here involved. This would appear to be in furtherance of the legislative purpose to encourage capital investment in the defense effort which would not be available because of fear that such investment would have no postwar value, and at the same time maintain the amortization benefits under such control that they would not unduly injure the revenue."

This amounts to saying that Congress intended to write into § 124 the idea of value for post-war use which was the basis of amortization under a somewhat similar statute enacted in 1918.

Under the 1918 act, if a facility had post-war useful value the difference between that estimated value and actual cost was allowed as a special amortization deduction. The legislative history of the act now under consideration convincingly demonstrates that Congress deliberately and purposefully departed from the principle of the 1918 act because experience had demonstrated it to be unsatisfactory and not productive of the desired result.

I shall not prolong this dissent by going fully into the legislative history of § 124. One brief quotation from the testimony of the Assistant Secretary of the

Treasury before the Senate Finance Committee will suffice to indicate the understanding which Congress had of the section as shown by the entire voluminous legislative history.

> "Senator George: Is the certificate that is issued on the recommendation of the National Council and the Secretary of War or Navy, as the case may be, limited to mere certification that the particular facility is necessary for defense, or do they go further and specify what the depreciation and obsolescence amount to?
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> "Mr. Sullivan: No, they do not.
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> "Senator George: They turn that back to the Treasury?
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> "Mr. Sullivan: No, sir; under the bill automatically the amortization to which they are entitled is 20 per cent a year, for 5 years."

At the time this discussion took place, subsection (f)(1) had been passed by the House and after this testimony the only change was to eliminate any participation by the Council of National Defense, leaving the certifying power to the Secretaries of War and the Navy.

We should remember that the five-year amortization provision is in reality nothing more than an acceleration of the ordinary allowable depreciation which in the course of time would retire the property.

A proposal that the government shall own all property which has been fully depreciated at the ordinary allowable rate would be generally rejected as unsound. It is therefore illusory to suggest, as was done in argument, that the government should take over all facilities fully amortized in five years under § 124. A suggested inclusion in the act of a provision that the

government might acquire the facility at the end of amortization for the nominal cosideration of $1.00 was rejected during congressional consideration.

After exhaustive study, I have been able to discover nothing in the language of the act, or in its legislative history, to indicate the Congress intended to give the certifying agency the right to determine that only a portion of the cost of a necessary facility could be amortized. The result in this case is so incongruous as to be almost grotesque. Here the War Department, badly in need of large quantities of graphitar, insisted that the appellant erect a new building and equip it with the necessary machinery, which the appellant proceeded to do. The Secretary of War certified the building to have been necessary in the interest of national defense. It does not comport with common sense for the War Production Board in 1944 to certify that only 35 per cent of a fraction of the cost of the machinery was necessary in the interest of national defense. The building alone could not produce graphitar and yet the building was certified as necessary in its entirety. It is not suggested that the need for graphitar was any less pressing in 1944 than in 1943.

For the reasons given I think the decision of the court is wrong. The judgment of the District Court should be reversed.

IN THE TAX COURT OF THE UNITED STATES

Docket No. 37694

(Filed March 14, 1955)

NATIONAL LEAD COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Floyd F. Toomey, Esq., and *Karl Reimer, Esq.*, for the petitioner.

Clay C. Holmes, Esq., and *James E. Markham, Jr., Esq.*, for the respondent.

Opinion

MURDOCK, *Judge:*

* * * * * * * *

War Facility Amortization.

The petitioner acquired, dissolved, and, after June 30, 1944, carried on the business of the American Bearing Corporation. American Bearing had filed applications for certificates of necessity to cover the cost of constructing facilities for the purpose of producing war products. Certificates of necessity respecting those facilities were issued pursuant to section 124 of the Internal Revenue Code, stating that the facilities "are necessary in the interest of national defense during the emergency period, up to 50% [in some 35%] of the cost." The facilities were constructed. The purpose of the certificates was to permit the petitioner to amortize the cost of the additional facilities over a period of 60 months rather than recover their cost through depreciation deductions over the normal useful lives of the facilities. The petitioner claimed accelerated

depreciation for the entire cost of the facilities, but the Commissioner limited the accelerated amortization to the percentages fixed in the certificates of necessity. The petitioner contends that the percentage limitations which the certifying authorities purported to impose must be ignored because they are in violation of the words of and the intention of Congress behind section 124.

Section 124 (a) provides that every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis of any emergency facility based upon a period of 60 months. Subsection (e) defines emergency facility as "any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31 1939, and with respect to which a certificate under subsection (f) has been made." Section 124 (f) (1) provides that in determining the adjusted basis of an emergency facility "there shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period" under regulations prescribed by the certifying authority with the approval of the President. The certificates in question were for construction after December 31 1939, and it is conceded that the adjusted basis of that construction is cost.

The petitioner contends that the words "only so much of the" cost refer to construction after Decem-

ber 31, 1939, and that the provision may not be read "the cost attributable to so much of such construction as the certifying authority has certified as necessary in the interest of national defense during the emergency period." It says the certifying authority was to certify facilities, not costs.

The United States Graphite Company sought to compel the certifying authorities to issue certificates which would cover all rather than only part of the cost of facilities which it had constructed. The District Court for the District of Columbia dismissed the complaint. *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944. The Court of Appeals for the District of Columbia affirmed per curiam without opinion, but Judge Wilbur K. Miller filed a dissent in which he discussed the problem. *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868, certiorari denied 339 U.S. 904. That taxpayer then sued on a claim for refund of taxes in the Court of Claims on the ground that the percentage of cost limitation on its certificates should be ignored. The Court of Claims held for the taxpayer, and the Government did not seek a writ of certiorari. *Wickes Corp.* v. *United States*, 108 F. Supp. 616.[2]

Judge Miller, in his dissenting opinion referred to above, considered and discussed the words used by Congress, the purpose which it sought to accomplish, and the legislative history of section 124. He stated, "After exhaustive study, I have been able to discover nothing in the language of the Act, or in its legisla-

[2] The Wickes Corporation was the successor to the United States Graphite Company. The cases also involved another issue which is not in the present case.

tive history, to indicate that Congress intended to give the certifying agency the right to determine that only a portion of the cost of a necessary facility could be amortized." His interpretation of section 124 (f) (1) was that it meant "there shall be included as amortizable cost only so much of the cost of the facility as is properly attributable to the part of it which was constructed after December 31, 1939, and which has been certified as necessary in the interest of national defense." The Court of Claims came to the same conclusion. This Court believes that the reasoning of Judge Miller in his dissenting opinion and of the Court of Claims is sound and that a correct interpretation of the provisions of section 124 entitles the petitioner in this case to amortize the full cost of the facilities certified over the accelerated period.

Reviewed by the Court.

Decision will be entered under Rule 50.

OPPER, *J.*, dissents on the last issue on the authority of *United States Graphite Co.* v. *Sawyer*, (C.A., D.C., Cir.) 176 F. 2d 868, certiorari denied 339 U.S. 904; and in consonance with the dissenting opinion of Chief Judge Jones in *Ohio Power Co.* v. *United States*, (Ct. Cl.; Mar. 1, 1955) — F. Supp. —.